

MAKING THE FUN STOP: YOUTH JUSTICE REFORM IN QUEENSLAND

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In 2013 the newly elected conservative Liberal National Party government instigated amendments to the Youth Justice Act 1992 (Qld). Boot camps replaced court ordered youth justice conferencing. In 2014 there were more drastic changes, including opening the Children's Court proceedings to the public, permitting publication of identifying information of repeat offenders, removing the principle of 'detention as a last resort', facilitating prompt transferral of 17 year olds to adult prisons and instigating new bail offences and mandatory boot camp orders for recidivist motor vehicle offenders in Townsville. This article compares these amendments to the legislative frameworks in other jurisdictions and current social research. It argues that these amendments are out of step with national and international best practice benchmarks for youth justice. Early indications are that Indigenous children are now experiencing increased rates of unsentenced remand. The article argues that the government's policy initiatives are resulting in negative outcomes and that early and extensive evaluations of these changes are essential.

I INTRODUCTION

As I said, we had a clear strategy. The first phase was to make the fun stop in detention centres by getting rid of the bucking bulls, the jumping castles and Xboxes, which we did.

Jarrod Bleijie (Attorney General Queensland)¹

In 2013 the newly elected conservative Liberal National Party government of Queensland instigated amendments to the *Youth Justice Act 1992 (Qld)*.² Boot

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¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2014, 596 (Hon J P Bleijie, Attorney-General).

² The Liberal National government was elected 24 March 2012 with 73 seats in an 89 member unicameral Parliament.

camps replaced court ordered youth justice conferencing. In 2014 more drastic changes were made, including:

opening Children's Court hearings for matters concerning repeat offenders and permitting the names of these children to be made public;

removing the sentencing principle of 'detention and imprisonment as a last resort' from the *Youth Justice Act 1992* and from the common law;³

mandating the transfer of seventeen-year-old offenders with six or more months remaining on their sentence to an adult correctional facility;

creating a new breach of bail offence for young offenders who are found guilty of committing an offence while on bail; and

mandating boot camp orders for recidivist motor vehicle offenders in Townsville.⁴

This article compares these amendments to the legislative frameworks in other jurisdictions and to the findings of current social research. It argues that these amendments diverge from the tenor of the fundamental legal principles encapsulated in the *Legislative Standards Act 1992* (Qld) and the United Nations *Convention on the Rights of the Child*.⁵ The amendments are out of step with national and international best practice benchmarks for youth justice.

³ See, eg, *R v WAY; Ex parte Attorney-General* [2013] QCA 398 compared to new s 150(5) *Youth Justice Act 1992* (Qld).

⁴ There are two additional amendments (allowing juvenile findings of guilt to be admissible when adults are being sentenced, and removing sentencing reviews) which are not examined in this article. The *Youth Justice and Other Legislation Amendment Act 2014* (Qld) s 7C omitted pt 6, div 9, sub-div 4 (Reviews of sentences by Childrens Court judge) from the *Youth Justice Act 1992* (Qld). Section 8 of the amending legislation inserted new s 148(3) concerning the admissibility of a childhood finding of guilt on sentencing.

⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <<https://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child/childfriendlycsrc.aspx>>.

II THE CONTEXT

The changes were foreshadowed in a Justice Department Discussion paper, released in June 2013 — to which the government solicited public responses via submissions — as well as a widely criticised web-based survey instrument.⁶ Only a summary of the results has been made publicly available. Of the 4184 respondents to the survey, 47.1 per cent were in an older age bracket (40–65 years).⁷ Over three quarters (76.8 per cent of the respondents) ‘had been a victim, or had a family member who was a victim, of a crime’, with 37.3 per cent of the incidents occurring within the previous 12 months.⁸ In addition, the Opposition members were quick to point out that the survey responses did not fully support the actual government amendments: ‘Two of the proposals did not have majority support and the other two were carefully worded and did not ask whether people supported them but merely whether they thought they would be effective’.⁹ Despite the skewed make-up of the respondent group, the responses to the Safer Streets survey also had favoured ‘providing education and employment (77.5%), providing better support to children experiencing violence and neglect (76.8%), and providing treatment to tackle drug addiction (73.7%)’ as the most effective interventions.¹⁰ In addition, the survey responses favoured ‘early intervention and prevention (75.4%), and employment programs (71.1%)’ as being effective reforms.¹¹

After the legislation was introduced into Parliament, the Legal Affairs and Community Safety Committee received 25 written submissions, including those from the university law schools (Queensland University of Technology, Bond University and Griffith University), the ARC funded Comparative Youth Penalty Project, the Youth Advocacy Centre Inc, the Queensland Law Society, the Queensland Bar Association and Amnesty International. Additional submissions were sought on further amendments presented while the legislation was under consideration by the Parliament’s Legal and Constitutional Affairs Committee. There are a total of 33 public submissions

⁶ Department of Justice and Attorney-General, *Safer Streets Crime Action Plan – Youth Justice* (18 July 2013) Queensland Government <<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/safer-streets-crime-action-plan-youth-justice>>.

⁷ Ibid.

⁸ Ibid.

⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2014, 604 (Bill Byrne).

¹⁰ Ibid.

¹¹ Ibid.

available on the Committee website.¹² Overwhelmingly, the tenor of the public submissions was critical of the punitive nature of the new provisions. The Youth Advocacy Centre concluded that ‘There is no research or evidence to support the contention that the proposed amendments will reduce offending ... the results are likely to be the reverse’.¹³ The Institute commented that ‘this bill is unnecessary and at odds with empirical evidence of what works in juvenile justice’.¹⁴ The Centre for Law, Governance and Public Policy at Bond University submitted that the government should take ‘an evidence-based approach’, ‘ensure that any program or service implemented by any stakeholders is comprehensively evaluated’ and ‘recognise the developmental characteristics of young offenders’. Its recommendation was that ‘the Bill should not be passed’.¹⁵ The government promised that strategies to balance inequities arising from the amendments would be addressed in funded interventions and programs for at-risk children — a *Blueprint for the Future of Youth Justice in Queensland*.¹⁶ This Blueprint has never been released.

The reforms to the youth justice system in Queensland were premised on the assumption that offending by young people is increasing. In fact, the statistics demonstrate that ‘rates per 100,000 juveniles in detention in Queensland have been relatively stable’.¹⁷ The most recent *Children’s Court of Queensland Annual Report* reiterates that ‘the trend line in relation to the number of juveniles dealt with shows a decline’ over the last 10 years.¹⁸ This is consistent with national statistics. According to Australian Bureau of Statistics (‘ABS’) figures the number of youth offenders (10–19 year olds) decreased

¹² Queensland Government, Legal Affairs and Community Safety Committee, <<http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/YouthJustice2014>>.

¹³ Youth Advocacy Centre Inc, Submission No 24 to Legal Affairs and Community Safety Committee, *Youth Justice and Other Legislation Amendment Bill 2014*, February 2014, 15.

¹⁴ Law and Justice Institute (Qld) Inc, Submission No 20 to Legal Affairs and Community Safety Committee, *Youth Justice and Other Legislation Amendment Bill 2014*, February 2014, 1.

¹⁵ The Centre for Law, Governance and Public Policy, Bond University, Submission No 13 to Legal Affairs and Community Safety Committee, *Youth Justice and Other Legislation Amendment Bill 2014*, February 2014, 2, 3.

¹⁶ Queensland Government, *Legal Affairs and Community Safety Committee Report No 58: Queensland Government Response* (2014) <<https://www.parliament.qld.gov.au/documents/committees/LACSC/2014/YouthJustice2014/gr-18Mar2014.pdf>>.

¹⁷ Kelly Richards, ‘What Makes Juvenile Offenders Different from Adult Offenders?’ (2011) 409 *Trends and Issues in Crime & Criminal Justice* 2.

¹⁸ Department of Justice and Attorney-General (Qld), *Childrens Court of Queensland Annual Report 2012–2013* (2014), 2.

by 6 per cent in 2012–13.¹⁹ Queensland figures for the same period show a 7 per cent decrease.²⁰ This is also consistent with international trends, with the arrests of young people in England and Wales falling by 20 per cent from 2010/11 to 2011/12.²¹ Juvenile arrests data for the United States in 2011 showed that arrests were down ‘11 percent from 2010 and down 31 percent since 2002’.²²

However the Childrens Court Reports for both 2011–2012 and 2012–13 identified that ‘the statistics seem to demonstrate that there are a number of persistent offenders who are charged with multiple offences’.²³ The government focused on this small group of ‘repeat’ or ‘persistent’ offenders — the 10 per cent responsible for up to 49 per cent of charges.²⁴ Recidivism among this small group became a focus during the debates on the Bill.²⁵ The amendments were therefore directed towards this small core of persistent youth offenders who commit serious crimes and who do not exit the system when treated using conventional youth court procedures. It was argued that this group justified a stricter approach.

At first glance this appears a logical policy objective, but targeted interventions have been used previously in South Australia for juveniles in the serious offender group and with limited success. Only a handful of declarations have been made under those provisions, and at least one declaration was overturned on appeal.²⁶ The new Queensland amendments are much broader. The ‘last resort’ principle has been totally removed from the

¹⁹ Australian Bureau of Statistics, *Youth Offenders Decrease by 6 Percent* (27 February 2014) <[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2012-13~Media%20Release~Youth%20offenders%20decrease%20by%206%20per%20cent%20\(Media%20Release\)~8](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2012-13~Media%20Release~Youth%20offenders%20decrease%20by%206%20per%20cent%20(Media%20Release)~8)>.

²⁰ Australian Bureau of Statistics, *Recorded Crime — Offenders, 2012-13 — Queensland* (24 March 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4519.0main+features282012-13>>.

²¹ Ministry of Justice (UK), *Youth Justice Statistics 2012/13 England and Wales* (2014) 18. However, it is unknown how many young people are diverted from the Youth Justice System after initially coming into contact with police: at 14.

²² US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: National Report Series Bulletin: Juvenile Arrests 2011* (2013), 1.

²³ Department of Justice and Attorney-General (Qld), above n 18, 2; Department of Justice and Attorney-General (Qld), *Childrens Court of Queensland Annual Report 2011–2012* (2013), 6.

²⁴ Department of Justice and Attorney-General (Qld), *The State of Queensland Department of Justice and Attorney-General Annual Report 2012–13* (2014) 24–5.

²⁵ See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2014, 608–9 (Verity Barton).

²⁶ See *R v P A*; *P A v Police* [2011] SASCFC 3 where an appeal against the making of such an order was allowed.

legislation — not just for a specific serious offender group. The breach of bail offences apply to young people who have simply been charged with (not convicted of) offences, placed on bail because they are supposedly not in a high risk category and then are convicted of another (possibly very minor) offence. The original charge may represent the first time a child has been charged with an offence.

Other amendments, such as the ‘naming and shaming’ provisions, apply to a child who is ‘not a first time offender’.²⁷ The definition is not limited to those children convicted of serious or violent offences, and would ostensibly catch those involved in a second rather than a third or subsequent offence. It is not clear whether all the offences could arise from the one incident, so that if, for example, a child were convicted of one offence, and then appeared on a separate charge arising from the same incident, the child would at that point no longer be ‘a first time offender’. In any case, the statistics demonstrate that the majority of childhood offending relates to theft offences, many of which are minor, rather than more serious violent offences.²⁸ The boot camp orders, removal of seventeen-year-olds to adult gaols, and breach of bail orders are examples of mandatory sentencing orders which remove the judicial discretion that would allow the courts to consider the child’s individual needs and the optimum response to them, so as to ensure the best chances of rehabilitation.

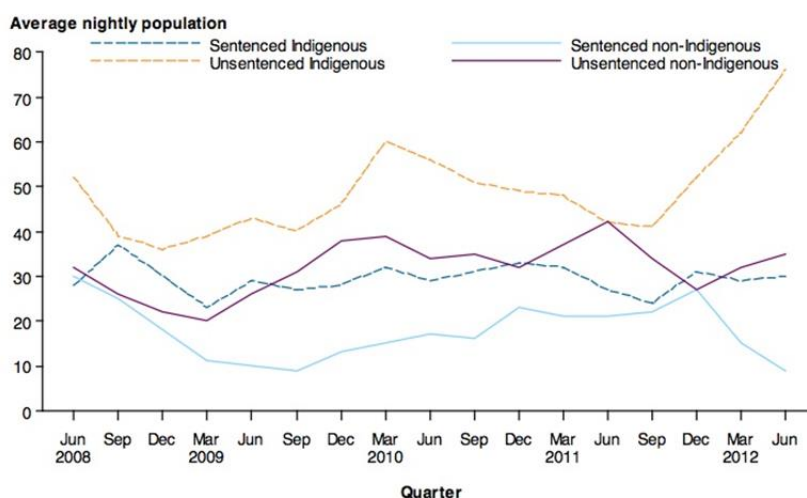
Blanket sentencing practice can have unequal outcomes. Australian Institute of Health and Welfare statistics demonstrate, for example, that throughout the four year period to June 2012, ‘the majority of young people in detention on an average night in Queensland were Indigenous’, and up to 50 per cent of these children were unsentenced (including those awaiting a court hearing or trial or those convicted and awaiting sentencing).²⁹ Remand figures up to June 2013, shown in the following graph, demonstrate a rise in Indigenous children being held in custody prior to sentence. This trajectory is unlikely to improve under the changed legislative policies.

²⁷ *Youth Justice Act 1992* (Qld) s 299A(1)(b).

²⁸ Australian Bureau of Statistics, above n 20: ‘The most common principal offence for youth offenders was Theft, accounting for nearly a quarter (24 per cent) of all youth offenders’; Australian Bureau of Statistics, *4519.0 – Recorded Crime – Offenders, 2012–13 (Youth Offenders)* (27 March 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2012-13~Main%20Features~Youth%20offenders~19>>. In Queensland, for youth offenders in 2012–13, the most prevalent principal offences (as measured by the offender rate per 100 000 persons aged 10–19 years), were illicit drug offences (696), and theft (695).

²⁹ Australian Institute of Health and Welfare, *Juvenile Justice Series no 13: Youth Detention Population in Australia 2013* (2013) 2, 36, vii.

Youth Detention Trends Queensland June 2008 – June 2012³⁰



Note: Trends among small populations should be interpreted with caution.

Source: Tables S11, S14, S21 and S24.

Figure 5.9: Young people in detention on an average night by Indigenous status and legal status, Queensland, June quarter 2008 to June quarter 2012

The increase in the number of unsentenced Indigenous children being held in detention was evident prior to the actual legislative amendments. Charges against juveniles increased in 2012–13.³¹ The Annual Report suggests that this was the result of ‘a substantial drop in the number of cautions being administered by police and legislative amendments which abolished the diversionary mechanism of court ordered Youth Justice conferencing’.³² According to a recent Draft of the Youth Detention Centre Demand Management Strategy, ‘there has been an unprecedented growth in the numbers of young people sentenced and remanded to youth detention in Queensland in recent years’.³³ The statistics demonstrate that the daily average of young people detained has increased almost 36 per cent from 137 to 187 in the three years from 2011–12 to 2013–14.³⁴ The percentage of children held on remand had also increased in 2013 compared to the previous

³⁰ Source: Australian Institute of Health and Welfare, *Juvenile Justice Series no 11: Juvenile Detention Population in Australia 2012* (2012) 36.

³¹ Above n 19, 2.

³² Ibid.

³³ Department of Justice and Attorney-General, *Youth Detention Centre Demand Management Strategy 2013–2023* (September 2014), 4 <<http://www.scribd.com/doc/240007412/Draft-Youth-Detention-Centre-Demand-Management-Strategy>>.

³⁴ Ibid 8.

year (78 per cent compared to 67 per cent), and the period of remand had increased from 29.3 days in 2011–12 to 35.2 days in 2013–14.³⁵ The optimum capacity of the detention facilities was exceeded for 350 days in 2013.³⁶ The Consultation Draft study warns of an escalating risk cycle associated with 1) overcrowding stemming from room-sharing, 2) impacts to program delivery and services, 3) increased risks of adverse incidents, and 4) lockdowns caused by negative impacts on staff and staff availability.³⁷ The Strategy also warns that the impact of any initiatives to divert children away from detention in the promised ‘Blueprint’ is unlikely to be significant because of the existing ‘policy momentum in favour of detention’.³⁸

III THE AMENDMENTS

The *Youth Justice and Other Legislation Amendment Act 2014* commenced on 28 March 2014. Subsequent amendments have been made to address inadequacies in the legislation, including provisions covering security in the boot camps.³⁹ The amendments resulted in eight fundamental changes to youth justice processes and outcomes in Queensland, many of them targeting the small group of repeat offenders identified in the statistics and noted in the *Children’s Court Annual Report*. This article examines the substance of these changes and in doing so compares the laws to those in place elsewhere.

A ***Categorising Youth as ‘First-Time Offenders’ and ‘Those Who Are Not First-Time Offenders’***

The *Youth Justice Act 1992* and the *Children’s Court Act 1992* (CCA) regulate all proceedings dealing with youth offenders in Queensland. There are two jurisdictional tiers in the court — a Magistrate’s Court and a separate Children’s Court of Queensland constituted by judges of the District Court. Both courts have jurisdiction over offenders under the age of 17 years old, but indictable offences, that is, those crimes and misdemeanours only triable upon indictment, must be tried by a Children’s Court judge and a jury.

The amendments categorise an offender as a child who is a ‘first-time offender’ and a child who is ‘not a first-time offender’. The legislation defines

³⁵ Ibid 9.

³⁶ Ibid 8, fn 10.

³⁷ Ibid 16.

³⁸ Ibid 14.

³⁹ *Explanatory Notes, Criminal Law Amendment Bill 2014* (Qld).

a first-time offender as ‘a child who at any time during a proceeding has not been found guilty of an offence’.⁴⁰ The term ‘not a first-time offender’ is not defined in the new provisions. The first-time offender definition refers to those found guilty of an ‘offence’, that is ‘an act or omission which renders the person doing the act or making the omission liable to punishment’.⁴¹ Section 3 of the *Criminal Code* (Qld) divides ‘offences’ into criminal offences and regulatory offences, with criminal offences comprising indictable and simple offences.

Unlike the position under the South Australian legislation, this categorisation does not target those children who have been charged and convicted of serious, indictable or violent offences on several occasions. In that state, the *Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act 2009* (SA) included a new category of ‘recidivist young offender’ in section 20C of the *Criminal Law (Sentencing) Act 1988* (SA) and the *Young Offenders Act 1993* (SA).⁴² To come under this provision the young offender has to have been convicted three times of one of a number of very serious offences. The recidivist young offender is to be sentenced to detention and has a non-parole period of four-fifths of the head sentence. In addition, unlike the Queensland Act, the 2009 South Australian legislation included an early review provision, and the Social Development Committee of the South Australian Parliament is currently reviewing this legislation. The Law Society of South Australia’s submission on the Review questions the ‘relevancy, necessity and effectiveness’ of such labelling provisions,⁴³ and the need to legislate for a minority of offenders when the existing legislation already has ‘sufficient scope to respond’ to the offending.⁴⁴ This was also the case with the previous Queensland provisions and, on a plain reading of these new amendments, children who have been found guilty of minor offences will be treated in a similar manner to those children who have been found guilty of very serious indictable offences.

⁴⁰ *Youth Justice Act 1992* (Qld) sch 4.

⁴¹ *Criminal Code Act 1899* (Qld) s 2.

⁴² If a young offender was categorised in this way then according to s 23(4) of the *Young Offenders Act 1993* (SA) ‘a sentence of detention must not be imposed for an offence unless (a) the offender is a recidivist young offender; or (b) in any other case—the Court is satisfied that a sentence of a non-custodial nature would be inadequate (i) because of the gravity or circumstances of the offence; or (ii) because the offence is part of a pattern of repeated offending’.

⁴³ *Ibid.*

⁴⁴ Law Society of South Australia Children and the Law Committee, Submission No 4 to The Social Development Committee, *Inquiry into the Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act 2009*, 29 August 2014, 1.

B *Opening the Children's Court for Hearings of Matters for 'Repeat Offenders' and Permitting Publication of Identifying Information for This Group*

Section 301(3) of the *Youth Justice Act 1992* states that there is to be no publication of 'identifying information about a first-time offender' unless 'the publication is necessary to ensure a person's safety'. In fact, the courts have always had the power under section 234 of the Act⁴⁵ to allow the publication of identifying information regarding juvenile offenders (whether charged with a first or subsequent offence) when they consider such publication to be in the interest of justice,⁴⁶ when the offence carries a life sentence or when the offence involves violence, or when the offence is of a particularly heinous nature.⁴⁷ However for those children 'who are not first-time offenders' proceedings are to be held in open court.⁴⁸

In addition, according to the new section 299A of the *Youth Justice Act 1992*, information about a child 'who is not a first time offender' is to be made public unless there is an order in place prohibiting publication. Such a child could be appearing before the court charged with a less serious matter. This provision actually creates a 'second strike' penalty, and it is not clear whether it would cover, for example, three charges arising out of the same incident (for example 'ham, cheese and tomato' type charges equivalent to charges of drunk and disorderly conduct, resisting arrest and assaulting police).⁴⁹ The court retains a discretion to make an order prohibiting the publication of identifying information about the child such as the child's name, address, school or place of employment, or a photograph, picture, videotape or other visual representation of the child or someone else, if it considers that such a prohibition 'is in the interests of justice'.⁵⁰ There is potential for delays to

⁴⁵ *Youth Justice Act 1992* (Qld) s 234. See also s 176(3)(b), not amended in 2014.

⁴⁶ *Ibid* s 234(4).

⁴⁷ See *Youth Justice Act 1992* (Qld) s 176(3)(b). See also *R v Rowlingson* [2008] QCA 395 for an example of where this would be thought necessary. Cf *R v SBU* [2012] 1 Qd R 250 and *R v Maygar*; *Ex parte Attorney-General (Qld)*; *R v WT*; *Ex parte Attorney-General (Qld)* [2007] QCA 310.

⁴⁸ *Childrens Court Act 1992* (Qld) s 21C. A proceeding before the court for a matter in relation to a child who is 'not a first-time offender' must now be held in open court, unless the court '(a) orders the court be closed; or (b) excludes a person under s 21E'.

⁴⁹ Australian Human Rights Commission, *Indigenous Deaths in Custody 1989–1996: A Report Prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner* (1996) ch 6 <<https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-6-police-practices>>.

⁵⁰ *Youth Justice Act 1992* (Qld) s 299A(4), sch 4. The examples given in the Act include 'identifying particulars'. See *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

occur while defence counsel argue for a closed court, but it is too early to assess the administrative and cost implications of these changes. Coincidentally, as these changes were being made, the separate Childrens Court building in Brisbane was closed and all children's matters were transferred to the sixth floor of the main Magistrates Court building, potentially making children's matters more accessible to media scrutiny.

These amendments are unique among the Australian jurisdictions apart from the Northern Territory. The Australian Capital Territory,⁵¹ New South Wales,⁵² South Australia,⁵³ Tasmania,⁵⁴ Victoria⁵⁵ and Western Australia⁵⁶ have all legislated to ban the publication of particulars identifying juvenile offenders.⁵⁷ In New South Wales there are exceptions where a 'person is convicted of a serious children's indictable offence and where the court authorises publication'.⁵⁸ In Western Australia the Supreme Court may allow publication under section 36A of the *Children's Court of Western Australia Act 1988* (WA) after considering 'the public interest and the interests of the child'⁵⁹ and, similarly, in Victoria the President of the Children's Court retains a discretion to allow publication on application.⁶⁰ Only the Northern Territory has a contrary rule.⁶¹ In that jurisdiction all proceedings are held in open court

⁵¹ *Criminal Code 2002* (ACT) s 712A; *Children and Young People Act 2008* (ACT) s 77 (Family group conference).

⁵² *Children (Criminal Proceedings) Act 1987* (NSW) s 15A; *Young Offenders Act 1997* (NSW) s 65.

⁵³ *Young Offenders Act 1993* (SA) s 13(1).

⁵⁴ *Youth Justice Act 1997* (Tas) ss 22, 31; *Magistrates Court (Children's Division) Act 1998* (Tas) s 12.

⁵⁵ *Children, Youth and Families Act 2005* (Vic) s 534.

⁵⁶ *Young Offenders Act 1994* (WA) s 40; *Children's Court of Western Australia Act 1988* (WA) s 35.

⁵⁷ Duncan Chappell and Robyn Lincoln, 'Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory' (Final Report for Grant G2009/7475, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, ACT, 2012) 18.

⁵⁸ *Children (Criminal Proceedings) Act 1987* (NSW) s 15C.

⁵⁹ *Children's Court of Western Australia Act 1988* (WA) s 36A.

⁶⁰ The *Children, Youth and Families Act 2005* (Vic) s 534 prohibits any publication about proceedings that may identify the child, except with the permission of the President.

⁶¹ Unless an order is made under s 50 of the *Youth Justice Act* (NT), information *can be* published about a youth involved in proceedings (under s 49 proceedings against young people are in open court; therefore the material can be published unless an order is made to prevent publication).

so that all material is liable to be published unless an order is made to prevent publication.⁶²

The basis for these protections can be found in international human rights law. The *Convention on the Rights of the Child* includes rights to privacy in article 16 and article 40. Article 16 states that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks'.⁶³

Article 40 of the Convention states:

1. Parties [to the agreement] recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, Parties shall, in particular, ensure that:
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.

In addition, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') also includes a statement on the protection of privacy:

- 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

⁶² Ibid.

⁶³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.⁶⁴

The year 2014 marks the 25th anniversary of the *Convention on the Rights of the Child*. This Convention had its beginnings in the post-World War 1 era. In 1920 Eglantyne Jebb who was President of the Save the Children Fund and the International Red Cross Committee, established the *Save the Children International Union*, in order to address the welfare of children post-War.⁶⁵ The *Save the Children International Union* developed five aims and these were the basis for the *Declaration of the Rights of the Child*.⁶⁶ The Declaration, known as the *Geneva Declaration*, was adopted and proclaimed in the General Assembly of the League of Nations in September 1924.⁶⁷ It was followed in 1959 by the UN *Declaration on the Rights of the Child*, and in 1978 Poland presented a draft of the *Convention on the Rights of the Child* to the Commission on Human Rights.⁶⁸ In 1979 the United Nations announced the International Year of the Child but a final draft of the Convention was not submitted to the UN General Assembly until 1989. The Convention was adopted unanimously by the General Assembly on 20th November 1989.⁶⁹ Whilst the *Convention on the Rights of the Child* has not been legislated into Australian law directly, it was ratified by the Australian government in December 1990 and became binding on Australia in January 1991.⁷⁰ In *Minister of Immigration and Ethnic Affairs v Teoh*, which involved a review of a ministerial decision to deport a family's supporting parent, the High Court held that ratification of the Convention created a legitimate expectation that the Minister would act in conformity with the Convention 'and treat as a primary consideration the best interests of the children'.⁷¹

⁶⁴ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') GA Res 40/33, 96th mtg., UN Doc A/40/53 (29 November 1985).

⁶⁵ Eugene Verhellen, *Convention on the Rights of the Child: Background, Motivation, Strategies, Main Themes* (Garant 1994) 57–9. And see generally Andrew Trotter and Harry Hobbs, 'A Historical Perspective on Juvenile Justice Reform in Queensland' (2014) 38(2) *Criminal Law Journal* 77.

⁶⁶ Verhellen, above n 65, 58.

⁶⁷ League of Nations, *Geneva Declaration of the Rights of the Child of 1924* (adopted 26 September 1924).

⁶⁸ Verhellen, above n 65, 66.

⁶⁹ Ibid 70.

⁷⁰ Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1998) 62 *Australian Law Journal* 514.

⁷¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; *Lesianawai v Minister for Immigration and Citizenship* [2012] FCA 897 [32].

Australia has not yet signed the *Third Optional Protocol* to the Convention, the Protocol having been adopted by the UN General Assembly on 19 December 2011. Under article 5, it allows individual children to bring complaints to the UN Committee on the Rights of the Child alleging a violation of human rights.⁷² Therefore individual children in Australia cannot take an action to the International Court of Justice as occurred with Nick Toonen when he made an application to the United Nations Human Rights Committee challenging existing provisions of the *Tasmanian Criminal Code* under the First Optional Protocol of the *International Covenant on Civil and Political Rights*.⁷³

In addition, despite the Convention not being directly incorporated into Australian law⁷⁴ and the inability of children to bring complaints to the international forum, the Australian Human Rights Commission has investigative powers in relation to Australia's implementation or breach of the Convention.⁷⁵ The Commission can investigate complaints concerning any breaches of international human rights obligations committed by or on behalf of the Commonwealth or a Commonwealth agency in the exercise of a discretion or in abuse of power.⁷⁶ As a result Parliament can be advised to amend the legislation or take action to ensure compliance.⁷⁷

The United Nations Committee on the Rights of the Child monitors the implementation of the *Convention on the Rights of the Child* by States Parties to it. As a State Party to the Convention, Australia submits regular reports to the UN Committee on how the rights are being implemented in Australia. In the Concluding Observations of the UN Committee on the Rights of the Child in relation to its consideration of the fourth periodic report of Australia in

⁷² *United Nations Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* GA, 66th sess, UN Doc A/C.3/66/L.66 (2 November 2011). See also Paula Gerber, *Children and Human Rights Abuses: Coming to an International Stage?*, (30 January 2014) *The Conversation* <<http://theconversation.com/children-and-human-rights-abuses-coming-to-an-international-stage-22396>>.

⁷³ Human Rights Committee, *Toonen v Australia*, 15th sess, Communication No 488/1992, UN Doc CCPRC/50/D/488/1992 (31 March 1994) [2.1].

⁷⁴ Australian Human Rights Commission, *The Human Rights Brief No 2* (1999) [4] <<https://www.humanrights.gov.au/publications/human-rights-brief-no-2>>; George Winterton, 'Limits to the Use of the "Treaty Making Power"' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty* (The Federation Press, 1995) 34, 35.

⁷⁵ *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(aa)–(ab). See also the instruments listed at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.asp>>.

⁷⁶ *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(aa)–(ab).

⁷⁷ Australian Human Rights Commission, above n 74, [4].

2012, the Committee commented on the inadequacy of privacy protection for children involved in penal proceedings in Western Australia and the Northern Territory, where the publication of personal details was permitted.⁷⁸ The Preamble to the Convention acknowledges the *Declaration of the Rights of the Child*, and that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.⁷⁹ Therefore it is appropriate that the state provide those legal safeguards. Australia is due to submit its combined fifth and sixth periodic reports on progress under the Convention and its optional protocols by 15 January 2018.⁸⁰ This Queensland amendment will constitute a backward step for Australia’s compliance record.

Queensland legislation must also conform to the *Legislative Standards Act 1992* (LSA) which sets out the fundamental legislative principles underlying ‘a parliamentary democracy based on the rule of law’.⁸¹ According to these, legislation must have sufficient regard to ‘the rights and liberties of individuals’. The Queensland Parliament’s Legal Affairs and Community Safety Committee (LACSC) identified that clause 21 of the Youth Justice and Other Legislation Amendment Bill 2014 (Qld) inserting section 299A of the *Youth Justice Act* (publication where children are not first time offenders) would operate retrospectively and hence apply to criminal proceedings that had commenced prior to the amendments. This retrospectivity would also apply to other of the *Youth Justice Act* amendments, including findings of guilt while on bail, removal of the principle of detention as a last resort, and automatic transfers to corrective services facilities.⁸² The Parliamentary Committee’s response indicated that these abrogations of rights were justified in order to avoid ‘potential disruption to the courts, as provided in the Explanatory Notes’.⁸³ The Report quotes the Explanatory Notes to the Bill to the effect that ‘These amendments are accordingly justified on the basis that

⁷⁸ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention Concluding Observations: Australia*, 16th sess, 29 May–15 June 2012, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 9, 10; Duncan Chappell and Robyn Lincoln, ‘Shhh... We Can’t Tell You: An Update on the Naming and Shaming of Young Offenders’ (2009) 20(3) *Current Issues in Criminal Justice* 476.

⁷⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸⁰ Australian Human Rights Commission, *Reporting to the UN Committee on the Rights of the Child?* (18 December 2014) <<http://www.humanrights.gov.au/reporting-un-committee-rights-child>>.

⁸¹ *Legislative Standards Act 1992* (Qld) s 4.

⁸² Queensland, *Legal Affairs and Community Safety Committee, Public Hearing—Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, 3 March 2014, 41.

⁸³ *Ibid* 43.

they strike an appropriate balance between protecting children appearing before the youth justice system while holding young offenders and particularly repeat offenders more properly to account'.⁸⁴ The Committee was therefore of the view that 'strong arguments' existed to justify the adverse effects the retrospective legislation would impose.⁸⁵ These arguments were not identified in the Report. Two Committee members did not support the Bill and registered a dissent to the Report.⁸⁶

To endorse the naming and labeling of a child (and by implication their parents, siblings and community) can lead to long term detrimental effects on their education and work prospects. Submissions on the proposed bill from various groups, including the Bar Association of Queensland, the Caxton Legal Centre, the Queensland Council for Civil Liberties, and Griffith University, pointed out that naming has numerous negative repercussions such as inhibiting rehabilitation, stigmatising the child, identifying and impacting on third parties (including parents, siblings and others in the community) and increasing recidivism. Naming has a disproportionate impact on disadvantaged youths as against those with financial support.⁸⁷ The Northern Territory 'naming and shaming' provisions have been widely criticised.⁸⁸ The identification of young people in the Northern Territory translated to reporting in the media in an uneven fashion so that some media organisations had a policy not to report, some were reporting on suppression orders, and in other instances the names were made available in national newspapers.⁸⁹ In addition, the NSW Standing Committee on Law and Justice 2008 investigation into the relative benefits and disadvantages of public naming for youth offenders found that naming would have a detrimental impact on youth offenders and their rehabilitation and on victims of crime and their families.⁹⁰

⁸⁴ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) quoted in Queensland, *Legal Affairs and Community Safety Committee, Public Hearing—Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, 3 March 2014, 14.

⁸⁵ Queensland, *Legal Affairs and Community Safety Committee, Public Hearing—Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, 3 March 2014, 44.

⁸⁶ Bill Byrne (ALP Rockhampton) and Peter Wellington (IND Nicklin).

⁸⁷ Queensland, *Legal Affairs and Community Safety Committee, Public Hearing—Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, 3 March 2014, 7–9.

⁸⁸ Chappell and Lincoln, above n 57; Jodie O'Leary, 'Naming Young Offenders: Implications of Research for Reform' (2013) 37 *Criminal Law Journal* 377.

⁸⁹ Chappell and Lincoln, above n 57; Chappell and Lincoln, above n 78.

⁹⁰ New South Wales Standing Committee on Law and Justice, Legislative Council, *The Prohibition on the Publication of Names of Children involved in Criminal Proceedings* (2008).

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Juvenile offenders can be punished and encouraged to take responsibility for their actions without being publicly named. Judicial sentences for juveniles can and do reflect community outrage, denouncement [sic] of the crime and acknowledgement of the harm caused to victims. There are confidential processes such as juvenile youth conferences, in which the offender must often face their family and the victim of their crime, that utilise shame constructively and supportively to help the offender reintegrate into the community. The importance of rehabilitation is all the greater when a juvenile offender is involved, since the benefits flowing to the offender and the community will continue for the rest of their life.

The prohibition impacts not just on juvenile offenders, but also victims, their families and the media.⁹⁵

⁹¹ Queensland, *Legal Affairs and Community Safety Committee, Public Hearing—Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, 3 March 2014, 7–9.

⁹² Chappell and Lincoln, above n 57; O’Leary, above n 88.

⁹³ Chappell and Lincoln, above n 57; Chappell and Lincoln, above n 78.

⁹⁴ NSW Standing Committee on Law and Justice, Legislative Council, *The Prohibition on the Publication of Names of Children involved in Criminal Proceedings* (2008).

⁹⁵ *Ibid* ix.

There has been little time to gauge the effects of these changes. However, in the recent Queensland District Court case of *R v TJB*, Reid J prohibited, under section 299A of the *Youth Justice Act*, publication of information identifying a repeat offender in circumstances where no convictions had been recorded.⁹⁶ This was done on the basis that ‘publication is unlikely to protect the community’, but would adversely affect his rehabilitation and ‘in that way increase the risk to the community’.⁹⁷ This judgment again recognises that publication of the identity of offenders will have a negative effect on the rehabilitation of the child and the child’s education and employment prospects. In addition, it may also affect victims of crime, who may be more easily identified through the naming of the offenders.

C *Removing the Principle of Detention as a Last Resort*

Removing the principle of detention as a last resort directly contravenes Australia’s human rights obligations under the *Convention on the Rights of the Child* and represents a fundamental change to the system of youth justice in Queensland. It is contrary to the tenor of the youth justice laws in other jurisdictions in Australia, and negates a century of developed wisdom in relation to childhood offending which recognises the distinction between adult and childhood offending and the overriding concern for rehabilitation when sentencing the youthful offender.

Article 37 of the Convention stipulates that States Parties shall ensure that

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

These principles are echoed in other international instruments including the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* and the *Standard Minimum Rules for the Treatment of Prisoners*. This principle was discussed in the 1997 Australian Law Reform Commission

⁹⁶ *R v TJB* [2014] QDC 185.

⁹⁷ *Ibid* [25] (Reid DCJ). In coming to the decision the Court considered *R v Cunningham* [2014] QCA 88 where a publication order was refused.

Report *Seen and Heard*.⁹⁸ It has also been recognised and applied by the courts in Queensland.⁹⁹

Every other jurisdiction in Australia has included this principle in some form in their youth justice legislation. The Australian Capital Territory,¹⁰⁰ the Northern Territory,¹⁰¹ Tasmania,¹⁰² and Western Australia¹⁰³ have included the phrase directly while New South Wales,¹⁰⁴ Victoria¹⁰⁵ and New Zealand¹⁰⁶ have done so indirectly. It is also recognised in relation to all but serious offenders within the South Australian legislation.¹⁰⁷

The Charter of Youth Justice Principles from the Convention is not directly legislated within the *Youth Justice Act* but instead has been included in Schedule 1 of the Act. Prior to the amendments, item 17 of Schedule 1 stipulated that ‘A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances’.¹⁰⁸ Item 17 was deleted from the Act. The Schedule is incorporated through section 150(1) of the Act which sets out the sentencing principles for the Act. These are stated to be, inter alia, ‘the general principles applying to the sentencing of all persons’, ‘the youth justice principles’, and the ‘special considerations’ stated in section 150(2). These special considerations include the child’s age, which is a mitigating factor, the fact that a non-custodial order better promotes reintegration into the community, the fact that rehabilitation of a child is greatly assisted by the child’s family

⁹⁸ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

⁹⁹ *R v SBU* [2012] 1 Qd R 250; *R v GDP* (1991) 53 A Crim R 112.

¹⁰⁰ *Children and Young People Act 2008* (ACT) s 94(f).

¹⁰¹ *Youth Justice Act* (NT) s 4(c).

¹⁰² *Youth Justice Act 1997* (Tas) s 5(1)(g).

¹⁰³ *Young Offenders Act 1994* (WA) s 7(h).

¹⁰⁴ *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2).

¹⁰⁵ *Children, Youth and Families Act 2005* (Vic) ss 361, 362(1). (a) Need to strengthen and preserve the relationship between the child and the child’s family (b) Desirability of allowing the child to live at home (c) the desirability of allowing education, training or employment of the child to continue without interruption or disturbance.

¹⁰⁶ *Children Young Persons and Their Families Act 1989* (NZ) s 208(d). A child or young person should be kept in the community where practicable.

¹⁰⁷ *Young Offenders Act 1993* (SA) s 3(3): ‘(b) family relationships between a youth, the youth’s parents and other members of the youth’s family should be preserved and strengthened; (c) a youth should not be withdrawn unnecessarily from the youth’s family environment; (d) there should be no unnecessary interruption of a youth’s education or employment.

¹⁰⁸ *Youth Justice Act 1992* (Qld) sch 1 item 17 (‘Charter of Youth Justice Principles’).

and education or employment opportunities. Prior to the amendments they used also to include the fact that '(e) a detention order should be imposed only as a last resort and for the shortest appropriate period'.¹⁰⁹ This too was deleted from the Act.

Section 150(2)(e) of the Queensland legislation has now been repealed, and according to section 150(5) of the amended *Youth Justice Act*,¹¹⁰ judges and magistrates must no longer apply this basic principle. The principle has been expressly overridden and therefore principles from prior case law are not to be followed in present or future judicial decisions in Queensland.¹¹¹ This change represents a departure from a basic tenet of domestic and international youth justice.

It may still be that the remaining context of the Youth Justice Act will provide the courts with adequate discretion to ensure that justice is done in some cases. In a recent appeal by a 13-year-old Indigenous boy to determine whether a sentence was manifestly excessive the court acknowledged that the principle of last resort was no longer part of the legislation. However, the Court considered the remaining provisions in section 150 and the Principles in Schedule 1 in deciding to allow the appeal on the facts.¹¹²

Not surprisingly, the latest statistics demonstrate that the numbers of children in detention have increased in Queensland from an average daily number of 134 in 2011 to 187 in 2013 and research findings clearly indicate that contact with and interventions by the juvenile justice system are likely to increase the likelihood of further offending.¹¹³ Certainly, one of the key recommendations

¹⁰⁹ Ibid s 150(2).

¹¹⁰ Section 150(5) of the *Youth Justice Act 1992* (Qld) states that 'This section overrides any other Act or law to the extent that, in sentencing a child for an offence, the court must not have regard to any principle that a detention order should be imposed only as a last resort'.

¹¹¹ *R v RAO and BCR and BCS; Ex parte Attorney-General (Qld)* [2014] QCA 7 [29]; *R v SBU* [2012] 1 Qd R 250; *R v GDP* (1991) 53 A Crim R 112; and see generally the discussion of NSW principles in Lester Fernandez, 'Place of Rehabilitation in the Sentencing of Children for Serious Offences' (2004) 2 *Children's Legal Service Bulletin* <http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/6507/Place-of-rehabilitation-in-the-sentencing-of-children-for-serious-offences.pdf>.

¹¹² *Nicholls v Commissioner of Police* [2014] QChC 5.

¹¹³ U Gatti, R Tremblay and F Vitaro, 'Iatrogenic Effect of Juvenile Justice' (2009) 50(8) *Journal of Child Psychology and Psychiatry* 991.

of the Royal Commission on Aboriginal Deaths in Custody was that arresting and imprisoning Indigenous people should always be a last resort.¹¹⁴

The Australian Institute of Criminology 'National Deaths in Custody Monitoring Program' reports that, since 1979–80, a total of 18 deaths have occurred in the custody of a juvenile justice agency.¹¹⁵ Eight of these were Indigenous children, and the majority were boys aged 16 and 17 years, many of them in detention for theft related offences.¹¹⁶ Eleven of the deaths were self-inflicted and due to hanging.¹¹⁷ The Report notes that 'research from the United States, conducted by the Office of Juvenile Justice and Delinquency Prevention, found that of the 110 suicides examined, 100 percent had occurred within the first four months of incarceration; of these, 40 percent occurred within the first 72 hours', so even short terms in detention place vulnerable children at risk.¹¹⁸ The figures from England and Wales also demonstrate a number of self-inflicted deaths in custody.¹¹⁹ Between 1990 and 2012, Goldson reports that 33 children died in penal custody in England and Wales, 31 in state prisons and two in private gaols.¹²⁰

This amendment to the Act is dangerous and has the potential to have tragic consequences across the board, but especially for young Indigenous people who end up as inmates. In this context, the amendments are especially concerning and constitute a fundamental departure from domestic and international best practice.

¹¹⁴ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, [21.2], [22].

¹¹⁵ Mathew Lyneham and Andy Chan, 'Deaths in Custody in Australia to 30 June 2011: Twenty Years of Monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody' (Monitoring report No 20, Australian Institute of Criminology, 2013).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Ian Hayes, *Characteristics of Juvenile Suicide in Confinement* (Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, 2009) quoted in Lyneham and Chan, above n 115, 73; Similarly, research in the United Kingdom has shown that approximately 50 per cent of suicide-related incidents occurred within the first month of incarceration: J Shaw and P Turnbull, 'Suicide in Custody' (2009) 8(7) *Psychiatry Journal* 265.

¹¹⁹ *Deaths of Young People and Children in Prison* (11 September 2014) (Inquest) <<http://www.inquest.org.uk/statistics/deaths-of-young-people-and-children-in-prison>>. See also Barry Goldson and Deborah Coles, *In the Care of the State? Child Deaths in Penal Custody in England & Wales* (Inquest, 2005).

¹²⁰ Barry Goldson, *We Must Do More to Protect Our Children* (24 April 2014) *The Conversation* <<http://theconversation.com/we-must-do-more-to-protect-children-in-prison-25631>>.

D *Entrenching 17 Years as the Age of Criminal Responsibility in Queensland*

Article 1 of the *Convention on the Rights of the Child* states that: ‘For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’.¹²¹ Prior to this age, there are two categories into which young offenders will fall. Children are not held responsible for a criminal offence under 10 years in any Australian jurisdiction, nor in New Zealand, England and Wales.¹²² In Canada the applicable age is under 12.¹²³ In Australia older children — children from 10 to 14 years — have the benefit of the principle of *doli incapax*. This means that there is a rebuttable presumption that they are not criminally responsible unless it is proved that they knew that what they did was wrong as opposed to merely naughty or mischievous. Once again this principle is operative across all the Australian jurisdictions, as well as NZ,¹²⁴ although section 34 of the *Crime and Disorder Act 1998* (UK) has abolished *doli incapax* in the UK.¹²⁵ If children are charged with criminal offences in Queensland then they are dealt with under the *Youth Justice Act 1992* (Qld). According to Schedule 4 of that Act, a ‘child’ for the purposes of the Act means ‘(a) a person who has not turned 17 years’. Those offenders over 17 are dealt with as adults.

By treating 17 year olds as adults for the purposes of the criminal justice system, Queensland has been out of step with current practice both nationally and internationally for the last two decades. As is evident from the following

¹²¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹²² *Criminal Code 2002* (ACT) s 25; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code Act* (NT) s 38(1); *Young Offenders Act 1993* (SA) s 5; *Criminal Code Act 1924* (Tas) s 18(1); *Criminal Code Act 1899* (Qld) s 29(1); *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code Act Compilation Act 1913* (WA) s 29; *Crimes Act 1914* (Cth) s 4M; *Criminal Code Act 1995* (Cth) s 7.1; *Crimes Act 1961* (NZ) s 21; *Children and Young Persons Act 1933* (UK) s 50.

¹²³ Under 12 in *Canada Criminal Code 1985* (Can) s 13. No child under eight can be guilty of an offence and no child under 12 can be prosecuted for an offence under the *Criminal Procedure (Scotland) Act 1995* ss 41–41A.

¹²⁴ *Criminal Code 2002* (ACT) s 26(1); *Criminal Code Act* (NT) s 38(2); *Criminal Code Act 1924* (Tas) s 18(2); *Criminal Code Act 1899* (Qld) s 29(2); *R v ALH* (2003) 6 VR 276; *Criminal Code Act Compilation Act 1913* (WA) s 29; *Crimes Act 1914* (Cth) s 4N; *Criminal Code Act 1995* (Cth) s 7.2; *Crimes Act 1961* (NZ) s 22;

¹²⁵ See *Regina v J T B (Appellant) (on appeal from the Court of Appeal Criminal Division)* [2009] AC 1310, 1329 [7]: ‘It had become customary to speak of the presumption of *doli incapax* as embracing both the presumption and the defence. In using the language of s 34 of *Crime and Disorder Act 1998* (UK), Parliament intended to abolish both the presumption and the defence’.

table, all the states of Australia, as well as England, Wales and Canada, use 18 as the age of majority for criminal responsibility. Only New Zealand and Scotland have lower age limits.

Comparative Table: Legislative Age Limits		
	Age up to which dealt with in a youth court	Reference
Queensland	Under 17 years of age	<i>Youth Justice Act 1992</i> (Qld), sch 4
Northern Territory	Under 18 years of age	<i>Youth Justice Act</i> (NT) s 6.
Western Australia	Under 18 years of age	<i>Young Offenders Act 1994</i> (WA) s 3
Victoria	Under 18 years of age	<i>Children, Youth and Families Act 2005</i> (Vic) s 3
South Australia	Under 18 years of age	<i>Young Offenders Act 1993</i> (SA) s 4
New South Wales	Under 18 years of age	<i>Children (Criminal Proceedings) Act 1987</i> (NSW) s 3
ACT	Under 18 years of age	<i>Children and Young People Act 2008</i> (ACT) s 12
Tasmania	Under 18 years of age	<i>Youth Justice Act 1997</i> (Tas) s 3
England and Wales	Under 18 years of age	<i>Children and Young Persons Act 1933</i> (UK) s 107; <i>Crime and Disorder Act 1998</i> (UK) s 117.
Canada	Under 18 years of age	<i>Youth Criminal Justice Act 2003</i> (Can) s 2
NZ	Under 17 years of age	<i>Children Young Persons and Their Families Act 1989</i> (NZ) s 2(1)
Scotland	Under 16 years of age	<i>Children (Scotland) Act 1995</i> s 93; <i>Children's Hearings (Scotland) Act 2011</i> s 199

The US Supreme Court in *Roper v Simmons* rejected the imposition of the death penalty on juvenile offenders under 18.¹²⁶ In his judgment, Justice Kennedy discussed the three main differences between juveniles and adults as being ‘a lack of maturity and an underdeveloped sense of responsibility’, lack of control and vulnerability to external pressure, and underdeveloped personality traits.¹²⁷ His deliberations led to the conclusion that, despite all the objections to categorised rules, ‘a line must be drawn’.¹²⁸

The Queensland Commission for Children and Young People and Child Guardian reported that, during the 2011–2012 reporting period, 230 young people aged 17 years were being accommodated in high security adult correctional facilities across Queensland, of whom 27.4 per cent were held on remand.¹²⁹ Approximately half of these were Indigenous (52.2 per cent) and 9.1 per cent were girls.¹³⁰ The most common offences were property offences, followed by violent offences and driving offences.¹³¹ Almost 5 per cent of the total population of 17 year olds subject to finalised Child Protection Orders during 2011–12 were also subject to orders in the adult correctional system.¹³² The Commission pointed out how anomalous this situation was, bearing in mind the State’s guardianship obligations under the *Child Protection Act 1999*.¹³³

International human rights frameworks stipulate that youth offenders should be subject to a separate system of criminal justice from adult offenders. In 2012, the UN Committee expressed concern that ‘All 17-year-old child offenders continue to be tried under the Criminal Justice system in the State party’s territory of Queensland’ and ‘Although the majority of 17 year olds are held separately from the wider prison population, there are still cases of children being held within adult correctional centres’.¹³⁴

¹²⁶ *Roper v Simmons* 543 US 541 (2005). See also discussion in Terry Hutchinson and Jamie Nuich, ‘Drawing the Line: The Legal Status and Treatment of 17-year-old Accused in Queensland’ (2011) 17 (2) *Australian Journal of Human Rights* 91.

¹²⁷ *Roper v Simmons* 543 US 541 (2005) 569–70.

¹²⁸ *Ibid* 574.

¹²⁹ Queensland Commission for Children and Young People and Child Guardian, *Child Guardian Report: Youth Justice System 2011-12* (2013) 120 <http://pandora.nla.gov.au/pan/14014/20140630-0820/www.ccygpcg.qld.gov.au/pdf/publications/reports/Child-Guardian-Report_Youth-Justice-System_2013/FinalYJReport2011-12.pdf>.

¹³⁰ *Ibid* 121.

¹³¹ *Ibid*.

¹³² *Ibid* 15.

¹³³ *Ibid* 23.

¹³⁴ Committee on the Rights of the Child, above n 78, 21 [82]–[83].

Pursuant to the recent amendments to the *Youth Justice Act*, 17 year olds who have six or more months remaining in detention will be transferred to an adult facility. This amendment further entrenches the current rule and, in removing judicial discretion in this area, additionally places young people in a more vulnerable position within the corrections system than they would otherwise have been in. The Queensland Law Society in its submission on the Bill expressed support for ‘the maintenance of judicial discretion in these matters’.¹³⁵ The Society also considered that:

maintenance of programs, such as access to educational support, is instrumental for a young person held in State custody. Transfer of a young person to an adult prison may undermine the progress made by a young person and remove the structure and discipline provided to them, but also undermine the investment made by these programs. The ability for continued access to these programs must be assessed by the courts on the facts of each particular case.¹³⁶

The Society also notes that there may sometimes be a failure to transfer a young person’s security level when he or she is transferred to adult prison, so young people coming into adult prison may be placed in high security settings where previously they had been on the lowest security level.¹³⁷

So, apart from the increased risks of physical harm, young people are vulnerable to a range of harms from being detained in adult gaols.¹³⁸ Kelly Richards argues that:

a range of factors, including juveniles’ lack of maturity, propensity to take risks and susceptibility to peer influence, as well as intellectual disability, mental illness and victimisation, increase juveniles’ risks of contact with the criminal justice system.¹³⁹

A study of the mental health needs of young offenders who had committed serious crimes and had been transferred to adult court and subsequently incarcerated in a prison for adults revealed that ‘mental health treatment needs appear to be even more pronounced in the small subgroup of youths

¹³⁵ Queensland Law Society, Submission No 16 to Legal Affairs and Community Safety Committee, *Youth Justice and Other Legislation Amendment Bill 2014*, 26 February 2014, 5.

¹³⁶ Ibid.

¹³⁷ Ibid 6.

¹³⁸ Commission for Children and Young People and Child Guardian, *Removing 17 year olds from Queensland Adult Prisons and Including Them in the Youth Justice System: Policy Position Paper* (2010).

¹³⁹ Richards, above n 17, 1.

transferred to the adult criminal justice system and incarcerated in adult prison'.¹⁴⁰ The research demonstrates that treating young offenders in this manner may provide a cheaper option than incarceration in youth detention centres, but is counterproductive from the point of view of the children and the community in the long term.

Gaols are dangerous places for young men between 16 and 21. Despite statements from the government that rape does not occur in Queensland detention facilities, this is far from the case.¹⁴¹ In addition, research findings indicate that there is generally a higher risk that a youth will experience sexual abuse and mental health problems in adult gaols than in juvenile facilities.¹⁴² Moving the small number of 17 year olds out of youth detention is not going to alleviate the overcrowding in the youth detention centres to any great degree, but these youths will be placed in more danger of harm in the adult system.

E Creating a New Offence where a Child Commits a Further Offence while on Bail

A new offence has been created for young offenders who are found guilty of committing an offence while on bail. This was one amendment to the *Youth Justice Act* that did have a relatively strong response in the Justice Department Survey in 2013, with 66.3 per cent of the admittedly small number of responses compared to the overall Queensland population indicating that it should be an offence for a child to breach bail conditions.¹⁴³ In all of the Australian states it is an offence not to appear for the court hearing when on bail for an offence.¹⁴⁴ In the Northern Territory, South Australia, Tasmania

¹⁴⁰ Daniel C Murrie et al, 'Psychiatric Symptoms among Juveniles Incarcerated in Adult Prison' (2009) 60(8) *Psychiatric Services* 1092.

¹⁴¹ Francis Tapim, *Prisoners Not Being Raped in Qld Jails: Bleijie* (19 April 2013) ABC News <<http://www.abc.net.au/news/2013-04-19/prisoners-not-being-raped-in-qld-jails-bleijie/4638566>>.

¹⁴² Liz Ryan, 'Keeping Youths Out of Adult Jails' (2013) 75(2) *Corrections Today* 16; Irene Y H, Ng et al, 'Incarcerating juveniles in adult prisons as a factor in depression' (2011) 21(1) *Criminal Behaviour and Mental Health* 21; See also Aaron Kupchik, 'The Correctional Experiences of Youth in Adult and Juvenile Prisons' (2007) 24(2) *Justice Quarterly* 247.

¹⁴³ Department of Justice and Attorney-General (Qld), above n 6. (The actual numbers constitute a very small percentage of the Queensland population and are in no way representative.)

¹⁴⁴ *Bail Act 1992* (ACT) s 49; *Bail Act 2013* (NSW) s 79; *Bail Act 1980* (Qld) s 33 and *Youth Justice Act 1992* (Qld) s 59A; *Bail Act 1994* (Tas) s 5(4); *Bail Act 1977* (Vic) s 30; *Bail Act 1982* (WA) s 51; Kelly Richards and Lauren Renshaw, *Bail and Remand for Young People in*

and Western Australia it is also an offence to fail to comply with bail conditions.¹⁴⁵

Bail breaches are often the result of unrealistically onerous bail conditions being put in place. However the new provision limits the additional offence to situations where a child has committed another ‘offence’ while the child is on bail, rather than a mere technical breach of conditions. Under section 59A of the Act, if

(a) the child is granted bail after being charged with an original offence; and

(b) a finding of guilt is later made against the child for a subsequent offence committed while on bail for the original offence[.]

(2) [t]he finding of guilt made against the child for the subsequent offence is taken to be an offence against this Act.

The maximum penalty is 20 penalty units or 1 year’s imprisonment.

The *Legislative Standards Act 1992* (Qld) section 4(2) indicates that legislation must have ‘sufficient regard to rights and liberties of individuals’. This will be contingent on the fact that, among other things, the legislation ‘does not reverse the onus of proof in criminal proceedings without adequate justification’.¹⁴⁶ Section 59B(3) of the *Youth Justice Act* reverses the onus of proof in relation to the new offence so that: ‘Upon production to the court of the copy of the bail order or copy of the child’s undertaking the court must immediately call on the child to prove why the child should not be convicted of an offence under section 59A’. There is no guarantee in this situation that the child will have an opportunity to fully prepare a case, or indeed have representation. Section 59B(1) states that the proceeding for an offence under section 59A ‘(a) may be started without complaint and summons; and (b) must be started immediately after the child is found guilty of the subsequent offence’.

The section does not refer specifically to the more serious ‘indictable’ offences. If the child is charged with a simple, summary or regulatory offence while on bail — for example a fare evasion charge — then the child could become liable to up to twelve months in detention. This is so even though the

Australia: A National Research Project: Reports Research and Public Policy Series no. 125 (Report No 125, Australian Institute of Criminology, 2013).

¹⁴⁵ *Bail Act* (NT) s 37B; *Bail Act 1985* (SA) s 17; *Bail Act 1994* (Tas) s 9.

¹⁴⁶ *Legislative Standards Act 1992* (Qld) s 4(3)(d).

child has not been tried or convicted of the original offence for which the child has been charged and placed on bail. This amendment has a potential to criminalise children unnecessarily. Even though the child has not been found guilty of the primary offence, the child is no longer a ‘first time offender’ under the new categorisation in the Act. This amendment is unnecessary and has the potential to inflate a child’s record which can then have a further effect in subsequent proceedings.

F *Mandatory Sentencing*

Mandatory sentencing laws require courts to impose minimum sentences of detention or imprisonment for people convicted of certain offences. They effectively remove judicial discretion in relation to those offences. The High Court has consistently held that it is the role of the courts and the sentencing judge to take into account all of the circumstances of the offence and offender in determining an appropriate sentence.¹⁴⁷

Mandatory sentencing has been used in the past in both Western Australia and the Northern Territory.¹⁴⁸ The Northern Territory mandatory sentencing provisions applying to youths convicted of repeat property offences were repealed in 2001.¹⁴⁹ In the second reading speech for the Northern Territory *Juvenile Justice Amendment Act (No 2) 2001*, Peter Toyne, Attorney-General for the Territory, stated that the mandatory provisions were being repealed because:

the regime has resulted in the imposition of unjust and inappropriate sentences of imprisonment while having no positive impact on the crime rate. There is no evidence to suggest that under mandatory sentencing offenders have been deterred from committing property offences. Moreover, the mandatory sentencing regime has done nothing for victims. The current minimum mandatory sentencing regime for property offences provides no scope for discretion except insofar as it commits the imposition of greater sentences. This has resulted in a regime that operates unfairly and

¹⁴⁷ *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 305 ALR 323; Legal Affairs and Community Safety Committee, Parliament of Queensland, Public Hearing—*Youth Justice and Other Legislation Amendment Bill 2014 Transcript*, (2014), 29. See also *Veen v The Queen* (No 2) (1998) 164 CLR 465; *Hoare v R* (1989) 167 CLR 348; *Markarian v R* (2005) 228 CLR 357.

¹⁴⁸ Australian Human Rights Commission, *Mandatory Detention Laws in Australia: An Overview of Current Laws and Proposed Reform* (2001) <<https://www.humanrights.gov.au/publications/mandatory-detention-laws-australia-2001>>.

¹⁴⁹ Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report September 2011* (2011) app 4, 204.

inconsistently. Because the mandatory minimum periods apply to all types of property offences, the current regime has not properly targeted suitable offences. We have seen inappropriate sentences of imprisonment apply to trivial offences and inadequate sentences apply to more serious offences such as housebreaking.¹⁵⁰

A ‘three strikes and you’re in’ bill applying to those convicted of a third offence of home burglary is, at the time of writing, before the Western Australian Parliament. The Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA) would introduce changes which would apply to juveniles aged over 16 with the intention being to ‘allow young offenders one chance at avoiding a sentence of detention before three burglary offences trigger a mandatory term of one year in detention’. The President of the Childrens Court, Judge Denis Reynolds, has warned that the amendments are ‘costly and ineffective and could encourage teenagers to pressure younger children to commit crimes’.¹⁵¹

In 2012, the UN Committee report on Australian compliance with the Convention expressed concern that ‘Mandatory sentencing legislation (so-called “three strikes laws”) still exists in the Criminal Code of Western Australia for persons under 18’.¹⁵² Despite this, the Queensland government has introduced mandatory sentencing provisions into the *Youth Justice Act*. The provisions apply only to those children within certain local government areas. According to the new section 176B, together with section 206A(1), of the *Youth Justice Act*, if a child ‘(a) is found guilty of a vehicle offence; and (b) is a recidivist vehicle offender’, then the court ‘must make a boot camp (vehicle offences) order against [the] child’. A recidivist vehicle offender is a child who:

(a) is found guilty of a vehicle offence (the *relevant vehicle offence*); and

(b) has, on or before the day the child is found guilty of the relevant vehicle offence, been found guilty of 2 or more other vehicle offences; and

¹⁵⁰ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2001 (Peter Toyne, A-G).

¹⁵¹ Amanda Banks, ‘Mandatory Sentencing on Track’, *The West Australian* (online), 20 May 2014 <<https://au.news.yahoo.com/thewest/latest/a/23665753/mandatory-sentencing-on-track/>>.

¹⁵² Committee on the Rights of the Child, above n 78, 21 [82].

(c) committed the other vehicle offences within 1 year before or on the day the relevant vehicle offence was committed.¹⁵³

The 'relevant vehicle offence' is unlawful use of a motor vehicle under section 408A of the *Criminal Code* (Qld).¹⁵⁴ Section 206B(1) of the Act provides that the boot camp order must be for a period of at least three months but not more than six months. If children run away from the boot camps then a warrant can be issued for their arrest and the child can be brought before a court to be charged with another offence.¹⁵⁵

These provisions target only repeat offenders involved in a specific type of offence in a stipulated geographical area. This is unequal justice in that one category of offender charged with one specific type of offence in certain geographic districts is being sentenced differently from a similar category of offender in other local government areas of the state.¹⁵⁶ This breaches fundamental tenets of sound legislation which exist to ensure equality before the law. In addition the provisions are retrospective, once again in contravention of the *Legislative Standards Act 1992* (Qld).

The boot camps that have been established in Queensland fit into two distinct categories — early intervention boot camps and sentenced youth boot camps. Early intervention camps are aimed at children who for a myriad of reasons are identified by their family, community or the police as being 'at risk' but have not been charged or sentenced for a criminal offence. The Sentenced Youth Boot Camp program is an additional sentencing option and was initially available only to young offenders from the Cairns region. The Cairns boot camp was closed after the first two children sent to the program escaped. Another facility of the same kind has now been opened at a remote station at Lincoln Springs just over 200 kms from Townsville.¹⁵⁷ A total of 17 young offenders have attended the camp since its opening, 'with one removed for

¹⁵³ *Youth Justice Act 1992* (Qld) sch 4, definition of 'recidivist vehicle offender'.

¹⁵⁴ *Youth Justice Act 1992* (Qld) s 206A(4).

¹⁵⁵ Acting Attorney-General and Minister for Justice, the Hon David Crisafulli, 'Youth Crime Top Priority for Government' (Media Release, 16 January 2014): <<http://statements.qld.gov.au/Statement/2014/1/16/youth-crime-top-priority-for-government>>.

¹⁵⁶ *Youth Justice Regulation 2003*, Part 3AA Prescribed areas, reg 9AA.

¹⁵⁷ Amy Remeikis, 'Govt Corrections Staff Work \$2m Boot Camp', *Brisbane Times* (Online), 20 May 2014 <<http://www.brisbanetimes.com.au/queensland/govt-corrections-staff-work-2m-boot-camp-20140520-zrj7j.html#ixzz339yOQS00>>.

failing to embrace the rehabilitation program'.¹⁵⁸ The boot camp order has now been extended once again to Cairns.¹⁵⁹

There is no empirical evidence to suggest that boot camps are good for stopping the cycle of youth crime and closing the revolving door of youth detention.¹⁶⁰ Wilson's meta-analysis of 32 robust research studies of 'militaristic' boot camps concluded that 'this common and defining feature of a boot-camp is not effective in reducing post boot-camp offending'.¹⁶¹

Wilson and Lipsey's research has clearly demonstrated that boot camps and wilderness camps are ineffective unless they include a strong therapeutic focus on education, families, and psychological and behavioural change.¹⁶² The consensus of the extensive US literature on boot camps is that they are not effective in deterring crime or reoffending or in promoting rehabilitation.¹⁶³

IV CONCLUSION

Many of the amendments discussed in this article are directed towards a category of 'persistent young offender' which comprises a very small proportion of the entire group of offenders. Holistic responses targeted at repeat offenders in this specific group are likely to be a more effective response. Labelling children by permitting identifying information about them to be published, and opening the Children's Court for youth justice matters, have not been proven to be effective deterrent strategies.

¹⁵⁸ David Sparkes, 'Boot Camp Kid Booted Back to Cleveland', *Townsville Bulletin* (Townsville), 10 April 2014.

¹⁵⁹ Attorney-General and Minister for Justice, Jarrod Bleijie, *Mandatory Boot Camp Order Expands to Cairns* (2014) The Queensland Cabinet and Ministerial Directory <<http://statements.qld.gov.au/Statement/2014/10/24/mandatory-boot-camp-order-expands-to-cairns>>.

¹⁶⁰ T Hutchinson and K Richards, 'Scared Straight: Boot Camps for Queensland' (2013) 38(4) *Alternative Law Journal* 229.

¹⁶¹ David B Wilson, Doris L MacKenzie and Fawn Ngo Mitchell, 'Effects of Correctional Boot Camps on Offending' (2005) *Campbell Systematic Reviews* 3.

¹⁶² Sandra Wilson and Mark Lipsey, 'Wilderness Challenge Programs for Delinquent Youth: A Meta-Analysis of Outcome Evaluations' (2000) 23(1) *Evaluation and Program Planning* 1.

¹⁶³ Benjamin Meade and Benjamin Steiner, 'The Total Effects of Boot Camps that House Juveniles: A Systematic Review of the Evidence' (2010) 38 *Journal of Criminal Justice* 841; Dale G Parent, *Correctional Boot Camps: Lessons from a Decade of Research* (US Department of Justice, 2003).

The removal of the principle of ‘detention as a last resort’ represents a fundamental change to the system of youth justice in Queensland and is not supported by the statistics on offending or empirical research into recidivism. This removal is contrary to the tenor of the youth justice laws in other jurisdictions in Australia and contravenes Australia’s human rights obligations under the UN *Convention on the Rights of the Child*.

The accepted age of majority for most civil rights in Australia is 18 years of age. By treating 17 year olds as adults for the purposes of the criminal justice system, Queensland’s *Youth Justice Act 1992* has been out of step with current practice both nationally and internationally for decades. The latest legislative amendment further entrenches this anomaly, and in removing judicial discretion in this area it additionally places young people in a more vulnerable position within the corrections system.

The fact that a breach of bail conditions now results in a second criminal offence, especially in circumstances where guilt in relation to the original offence has not been determined, is an unwarranted and harsh response to juvenile offending. The provision of mandatory penalties that are applicable only to a known group of offenders from one geographical area offends principles of equal justice for all citizens. It is also likely to unduly penalise Indigenous children and therefore is racially divisive.

These changes are contrary to Australia’s international obligations and in many instances offend the principles set out in the *Legislative Standards Act 1992* (Qld). Early evaluations of the changed policy demonstrate that the numbers of children in detention in Queensland are rising and that the detention facilities are unable to house the numbers without overcrowding. Further evaluations of these changes need to be undertaken immediately to ensure that the legislation is having the desired outcomes in terms of the stated government policies, judged by criteria such as statistics of offending and reoffending, court and detention costs, and effects on Indigenous youth wellbeing.